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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 612

THE CALIFORNIA OREGON POWER COMPANY, A CORPORATION,

Petitioner,

vs.

BEAVER PORTLAND CEMENT COMPANY, A CORPORATION, AND CITY OF GOLD HILL, OREGON, A MUNICIPAL CORPORATION,

Respondents.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

A. E. REAMES,
Medford, Oregon,
Counsel for Petitioner.

Service is admitted
April 4, 1935.
GUS NEWBURY,
Medford, Oregon,
W. LAIR THOMPSON,
Portland, Oregon,
Counsel for Respondents.

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To the Honorable the Supreme Court of the United States:

The Petitioner respectfully asks permission to file and herewith submits the following Reply Brief in answer to respondents' brief:

Petitioner Corrects Respondents' Errors.

Repeatedly the respondents have asserted that the petitioner's predecessor was a party to and asserted rights in

the adjudication of the waters of the Rogue River. Exhibit "O", the decree of adjudication (R. 294) is relied upon to support these assertions.

In respondents' brief at page 3 it is alleged that petitioner's immediate predecessor in interest

> "was a party to the adjudication, claimed water at another location on the Rogue River about three miles above the location presently involved and was decreed a right by appropriation at the upper location (R. 70)."

The record reference is to Finding VII (R. 70). The finding there made is: "There was adjudicated to California-Oregon Power Company, plaintiff's predecessor in interest, the right to appropriate the waters of the Rogue River in the development of power at a point known as Gold Ray, some three miles above the property of the plaintiff described in the complaint and in these findings," the words "was a party to the adjudication, claimed water at another location on the Rogue River about three miles above the location presently involved", are not in the finding referred to. There is no authority for this statement unless it be the portion of Finding VII, quoted above.

At page 5 of the brief it is stated:

> "Petitioner's predecessor was a party to the general adjudication of the relative rights to the use of the waters of the Rogue River and claimed no right at the location of petitioner's land." There is no authority for this statement unless it be claimed under Finding VII, *supra*.

At page 13 it is stated:

> "Both the riparian land and the owner of it as predecessors in interest of petitioner were respectively involved in and a party to the adjudication." There is no authority for this statement unless it be claimed

under Finding VII, *supra*. The *land* is not described in the decree nor was the petitioner's predecessor "involved" in the adjudication.

At page 14 it is asserted:

> "The California Oregon Power Company, the immediate predecessor of the petitioner, *asserted* and was adjudicated a right by appropriation to the use of the waters of the Rogue River in developing power at a point three miles above the location presently involved. Having thus *asserted* a right by appropriation in the same location that predecessor waived claims to the use of the water of the same stream by virtue of riparian ownership." There is no authority for the foregoing statement unless it be said Finding VII, *supra*. It nowhere appears that petitioner's predecessor "asserted" a right by appropriation.

The decree in the adjudication was not pleaded as an estoppel, nor otherwise. (Answer, R. 20-38.)

The decree was not an issue. According to the record neither the petitioner nor any predecessor in interest of the petitioner was ever served with process in the adjudication. Quotation, brief p. 181-2.

In re Willow Creek, 74 Ore. 592.

It is provided in the Water Code that all claims filed in adjudication proceedings shall be filed with the State Engineer, formerly the State Water Board. All appropriations made subsequent to the enactment of the Water Code must be applied for by filing in the office of the State Engineer. All transfers of such water rights after so filed and recorded must be filed and recorded in the same office. The following sections of the Water Code are applicable:

Sec. 25, brief appendix 11, governing the recordation of the water rights certificate; Sec. 27, brief appendix 12, "The Clerk of the Circuit Court immediately upon entry

of any decree by the Circuit Court or the Judges thereof, shall transmit a certified copy thereof to the Secretary of the Board of Control, and shall immediately record the same in the office of the State Engineer," etc.; Sec. 49, brief appendix 21, provides that any permit or license to appropriate may be assigned, etc., but no such assignment shall be binding except upon the parties thereto unless filed of record in the office of the State Engineer; Sec. 53, brief appendix 22, provides that when an appropriation has been perfected a certificate shall issue and shall be recorded as aforesaid.

So that, pending an adjudication, if claims therein filed, or permits to appropriate water, are transferred, said transfer is recorded in the office of the State Engineer. And the final decree goes to the assignee, as the successor of the claimant. These proceedings, as perhaps was the case in the Rogue River adjudication, are pending in the State Engineer's office for long periods of time. In this case perhaps for a period of from seven to ten years. If the successor to a claim filed in the adjudication enters or becomes a party thereto in the Circuit Court, he is of course substituted for the claimant.

If it had been the intention of the respondents to use the adjudication decree to preclude the assertion of the petitioner's riparian rights, they would have pleaded the same as *res adjudicata*. They did not do so because neither the petitioner nor its predecessor in interest in its lands involved here, was served with process, nor bound by the decree.

Assignment of Errors (R. 83).

At page 4 of respondents' brief it is claimed that petitioner has assigned as errors, the Court's legal conclusions from its findings, and did not question the findings. Briefly they are the following:

I. Petitioner's corporate capacity.

II. The acquisition by petitioner of its land involved herein.

III. The description of the land owned by respondents.

IV. The ownership of the respondents' rights by appropriation which are admitted in the pleadings.

V. The State Engineer's permits calling for 1127 cubic feet per second of water, issued to the City of Gold Hill.

VI. The terms of the contract between the respondents with reference to the purchase and sale of the City's property.

VII. No testimony was introduced that petitioner had used its reparian rights, but that a power right was adjudicated to petitioner's predecessor at an upper location.

VIII. That petitioner's predecessors had not used their riparian rights.

IX, X, and XI deal with the dynamiting of the river bed.

XII. That petitioner has failed to prove a vested right to the waters of the Rogue River "*except* that the plaintiff did prove that it is the owner and in legal possession of its said land abutting upon said river *and extending under the waters thereof, to the thread of the stream.*

XIII. That the removal of the shattered rock would not change the location of the boundary between the lands of the respective parties, and that respondents should be enjoined as set forth in the decree.

Petitioner's assignments of error are found at page 83 of the record. An examination will show that it has assigned as error that the court did not decree in accordance

with the petitioner's claims, these assignments being numbered I to VIII, inclusive. They are complete.

No. XII contains all that is required to define the riparian right for which the petitioner contends herein as the same is defined by the Oregon court in

Jones v. *Conn.*, 39 Ore. 30, cited in brief at page 244.

In that case it was held that the only thing necessary to entitle the riparian proprietor to his riparian rights is to show that the land borders on the stream; that this shows he is entitled, under the law, to the use of the waters subject only to the rights of other riparian proprietors in that stream. So that Finding No. XII is a finding for the petitioner, unless petitioner's rights have been *destroyed* by the Water Code.

The Good Faith of the Oregon Court.

At page 6 of the brief respondents imply that petitioner impugns the motives of the Oregon Court in its decision in the *Willow Creek* case. Far from it.

In re Willow Creek, 74 Ore., 592.

In that case the court was deciding the controversies in an adjudication under the code. A cause had been appealed to this Court from the Federal district court at Portland, *Pacific Livestock Co.* v. *Lewis.* In that case and in the *Willow Creek* case the question of whether or not the Water Code violated the Federal Constitution by impairing vested rights of riparian proprietors, was raised, and the Oregon court in the *Willow Creek* case, endeavored to cover the entire subject looking to a final determination of the constitutionality of the Water Code. The principal claimant in the adjudication claimed *both* as a riparian proprietor and as an appropriator. In that case, 74 Ore. 608, it is stated that the Eastern Oregon Land Company alleged that it was the owner of 7,000 acres riparian to the stream. And

at page 609 it is recited that it also claimed by appropriation out of various ditches, and with various priorities. The opinion held in effect that the settler upon a stream could claim under either doctrine, but that he could not in the same proceeding claim as both a riparian proprietor and an appropriator because the rights were inconsistent and difficult to administer. Having made certain provisions in the decree upon the claims by appropriation, the opinion recited that the company claimed water for 292.02 acres irrigated by overflow waters. It said that the method of irrigation *was crude,* but that it was unimportant how difficult or "with what ease water can be *appropriated for irrigation.*" It then proceeded to allow water for the additional acreage, 292.02 acres.

Whatever view the same court may have taken in 1924, in the *Hood River* case, the record in the *Willow Creek* case gives the impression that the allowance was made under the doctrine of appropriation. We make the following quotations from page 627 of the report:

> "Every riparian proprietor is entitled, as against other riparian proprietors, to a reasonable use of the water of a non-navigable stream flowing through his land, and after the natural wants of all have been supplied he may make a reasonable use of the surplus for irrigation purposes when he can do so without infringing upon the corresponding rights of the other proprietors: *Jones* v. *Conn,* 39 Or. 30 (64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, 54 L. R. A. 630). See, also, *Little Walla Walla Irr. Co.* v. *Finis Irr. Co.,* 62 Or. 348 (124 Pac. 666, 125 Pac. 270); *Sherred* v. *Baker,* 63 Or. 28 (125 Pac. 826). It was held in *Caviness* v. *La Grande,* 60 Or. 410, 421 (119 Pac. 731, 735), that:
>
> "'In the very nature of things, a court cannot fix in advance by its decree what quantity of water will be reasonable in the future for the use of a riparian proprietor claiming the duty of water in that character.'

> "Our statute was copied largely from the statute of Wyoming, *though the Constitution of that state differs from ours in that riparian rights have never been recognized.*"

It is interesting here to note that the Oregon court, then in 1915, announced that Oregon had obtained the riparian doctrine *through its constitutional adoption of the common law.* For it is stated that our statute was copied largely from that of Wyoming, for the Constitution of that State differs from that of Oregon in that riparian rights have never been recognized in Wyoming.

In the *Hood River* case, 114 Ore. 166, the writer of the opinion in the *Willow Creek* case set forth in the majority opinion, a copy of the Oregon Territorial Statute of June 27, 1844, together with a copy of Article 18, Sec. 7, of the Constitution of Oregon providing that all laws in force in the Territory of Oregon when the Constitution took effect, and consistent therewith should continue in force until altered or repealed. (Cited in petitioner's brief at page 222.)

The petitioner's criticism is that after the Oregon court had announced in the *Willow Creek* case the constitutional existence of the riparian right, and that it could not be destroyed by judicial decree or legislative act, the Water Code then under consideration should, in the *Hood River* case, decided *nine years later,* be held to have abrogated the vested riparian rights which the opinion in the *Willow Creek case* vouchsafed as unimpaired by the Water Code.

At page 624 of the opinion in the *Willow Creek case,* the Oregon court in discussing the Act of Congress of July 26, 1866, announced that the practical construction of the statute was that water could be appropriated as long as the land belonged *to the United States,* but that after the land over which the water flowed had been acquired, the water

was not subject to appropriation, *because* it flowed over private property, citing *the Oregon court, and this court.* (Brief appendix 65-6.)

Report of State Engineer (Resp. Bf. 47).

At page 6 of respondents' brief reference is made to an alleged report of the State Engineer of Oregon set forth in Respondents' Appendix to brief, 47. It appears to be a report of 1930 concerning streams on which "findings" have been entered giving acreage and the number of certificates issued. At page 48, "Rogue River, Jackson and Josephine Counties, 34,188." No certificates are shown to have been issued. The purpose of the "exhibit", if we may call it that, is not disclosed. It is not evidentiary. Its *first* appearance was in respondents' brief. It will perhaps be used for reference. Rogue River flows through Jackson County, before entering Josephine County. How much of the 34,188 acres are irrigated, if that is what the tabulation means, after the water has passed through the lands of the petitioner, cannot be known. But if it is the intention of respondents to use this as an argument that petitioner's success in this cause would disturb water rights to the acreage referred to, we may say now, that there is no occasion for this fear. It has always been the policy of the petitioner to waive in favor of upper irrigations, any rights petitioner might assert to the flow of the stream at the point in question. And it states here and now that it has no intention of interfering by any decree that may be entered here, with any irrigation rights out of Rogue River. Most of the waters so used are taken from upper tributaries and, after use, find their way back into the main stream above petitioner's lands.

Rule of Property.

Frequently throughout respondents' brief there is a reference to "the rule of property." The impression is given that petitioner's claim *rests upon a rule of property.* We have no contention with counsel as to the right of a State to change a rule of property.

The riparian right contended for is a *vested right.* It vested in petitioner's land upon the issuance of the patent thereto, under the Common Law doctrine of Riparian rights. And this right is *part and parcel of the land itself* as much as is any portion of the soil. And while the right is only a *usufruct,* that right *is in, is a part of, and abides with* the land. Such a right is the valuable property right under the authority of this court and the Oregon court. We refer to our points upon this subject numbered as follows:

Point No. 2, brief 77-89; point No. 3, legislative acts must be construed as prospective, brief p. 89-93; point No. 5, the Water Code as construed by the Oregon court violates the Oregon Constitution, brief pp. 121-2.

Weiss v. *Oregon Iron Works* is particularly in point.

An extended quotation therefrom is found in the appendix to the brief, pp. 52-56.

It is not a mere "rule of property" with which we are concerned; but with this changed construction of the Water Code, from the constitutional act it was when discussed in the *Willow Creek case,* to the *unconstitutional act which it is as construed* in the *Hood Rives case.*

However, the appellate court, while seeming to follow the Oregon Court in the *Hood River case,* held that the right of the Oregon Legislature to *destroy* the petitioner's vested right was to be found in the exercise of the police power of the State, *which had not been invoked in the Hood River decision.* The appellate court concluded that peti-

tioner's riparian rights to the natural flow of the stream was "validly abrogated by the Water Code of 1909, as construed by the Oregon court." (We quote in our brief, p. 201). And this the appellate court called "*regulation*", and which we assert is the taking without due process of law.

Riparian Doctrine of Appellate Court.

At page 18 of their brief, respondents quote what they allege is the doctrine of the appellate court applicable here.

We make the folowing quotation from a decision of that court in the year 1912, *three years* after the passage of the Water Code:

> *Eastern Oregon Land Co.* v. *Willow River Land & Irrigation Co.* (Circuit Court of Appeals, Ninth Circuit, November 1, 1912), No. 2,007, 201 Fed. Rep. 203, 213.
>
> "It will not be necessary to enter into a discussion of the statutes and various decisions of the Supreme Court of Oregon defining riparian rights in that state. We will accept the opinion of the learned District Judge in this case upon that question that:
>
> 'The riparian proprietor is entitled to the ordinary and usual flow of a stream as long as it is of any beneficial use to him and this may, under some circumstances, include flood or overflow waters reasonably to be anticipated during ordinary seasons.'"

Natural Rights.

At numerous places in respondents' brief it is asserted that the decree leaves to petitioner its "natural rights," as a riparian proprietor. As construed, the Water Code leaves no rights to the petitioner. By Sec. 1 of the Act, brief appendix 1, appropriations can only be made by application to the State Engineer for permits under the terms

of the Act. It forbids the use of any water except through such appropriations, or from riparian rights that had been used prior to the passage of the Act.

In respondent's brief, p. 59, a citation is made to sec. 66-68, appendix to petitioner's brief, pp. 28-29, as authority that the Water Code provides a penalty for using water in violation of its provisions. Strange to say a decision of this Court is there quoted in support of the contention that petitioner's vested right can not be exercised because of this criminal provision of the Water Code. This is a remarkable contention. A vested right in property can be instantly destroyed by the fiat of the legislature and put into effect by an emergency clause, and thereafter the exercise of that right is prohibited because the legislature has provided a penalty for its use. The mere statement of that contention to this Court is sufficient to preclude any argument. Natural rights are those that naturally go with the land and are the common law rights that were recognized as part and parcel thereof.

Admittedly to allow the decree here to stand, would result in the thread of the stream being moved westward from petitioner's present boundary a distance of 150 to 200 feet, leaving hot, dry rocks over which formerly flowed the clear, placid, beautiful waters of the Rogue River. As stated by Mr. Justice McBride from the bench of the Oregon Court in 1919, ten years after the passage of the Water Code, and in *Hansen* v. *Thornton,* 91 Ore. 585 (brief p. 80):

> "When we speak of riparian rights we are not considering a mere shadowy privilege but a substantial property right, the right of access to and a *usufruct* in the water."

The Desert Land Act.

In their brief at page 43 respondents cite *Boquillas Cattle Co.* v. *Curtis,* 213 U. S. 339-344. That case came to this

Court from the Supreme Court of the State of Arizona. Concerning the Desert Land Act Mr. Justice Holmes stated that the opinion there expressed, made it unnecessary to decide whether the lands in the arid regions patented after March 3, 1877, are not excepted subject to the rule that priority of appropriation gives priority of right by virtue of that Act construed with Rev. Stat. Sec. 2339. "The Supreme Court of Oregon has rendered a decision to that effect on plausible grounds."

The opinion is not an authority in point. The remark of the court as to the plausible ground upon which *Hough* v. *Porter* was based, did not purport to indicate that the State of Oregon was justified in making the construction which it did make of a Federal statute governing property, the title to which was in the United States. Arizona's Constitution was held in that case, in this Court, to be a *rejection* by the State, of the common law riparian doctrine. Later we quote from the *Boquillas* case upon this point.

In a Case Recently Decided by This Court it is Said:

> "The laws of the United States alone control the disposition of title to its lands. The states are powerless to place any limitation or restriction on that control. *Wilcox* v. *Jackson*, 13 Pet. 498, 516, 517; *Gibson* v. *Chouteau*, 13 Wall. 92, 99; see *Brewer-Elliott Oil Co.* v. *United States, supra*, 88; *United States* v. *Utah, supra*, 75. The construction of grants by the United States is a federal not a state question. *Packer* v. *Bird*, 137 U. S. 661, 669, 670; *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47, 54; *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District*, 232 U. S. 186, 196, and involves the consideration of state questions only insofar as it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances. See *Oklahoma* v. *Texas, supra*, 594, 595; *Utah Power & Light Co.* v. *United States*, 243

U. S. 389, 404. In construing a conveyance by the United States of land within a state, the settled and reasonable rule of construction of the state affords an obvious guide in determining what impliedly passes to the grantee as an incident to land expressly granted." (*United States* v. *Oregon*, Orig. No. 13, Dec. Apr. 1st, 1935.)

At page 46 of respondents' brief it is alleged that the "State of Oregon *early* construed the Desert Land Act to eliminate riparian rights with respect to lands in this State patented after March 3, 1877." "*Early*" means shortly after March 3, 1877. The first reference in the Oregon decisions to such a construction of the Desert Land Act was made in *Williams* v. *Altnow*, 51 Ore. 275, *thirty-one years* after the enactment of the Act. Petitioner's patent was issued April 20, 1885.

In *Fall* v. *Cooke*, 19 Ore. 455 (July 1, 1890) the Oregon court was construing a patent issued in March, 1885, within a month of the date of petitioner's patent. While that case was under consideration there came to the attention of the Oregon court, *Sturr* v. *Beck*, 133 U. S. 541, decided March 3, 1890, and the Oregon court followed with approval that case, and which was in accord with a previous Oregon decision of the same term, *Larsen* v. *O. R. & N. Co.*

In *Sturr* v. *Beck*, Mr. Chief Justice Fuller was construing the effect of a patent issued March, 1877, with relation to a conflicting water right. The effect of said decision of this court (as construed in *Fall* v. *Cooke* by the Oregon court), was that the homesteader"s riparian right attached from the date of his settlement provided he obtained patent to the land, and cut off any right to divert a stream of water running through such homestead. We quote in our brief at pp. 61-62.

Mr. Chief Justice Fuller in *Sturr* v. *Beck made no mention of the Desert Land Act* or any reference thereto, but

adhered to the riparian doctrine applicable to lands bordering on non-navigable streams.

A further discussion of the Desert Land Act is to be found in petitioner's brief at pages 183-190.

The California Cases.

At page 68 of petitioner's brief reference is made to the case of *Gin. S. Chow* v. *City of Santa Barbara* and *Peabody* v. *City of Vallejo*, cited in petitioner's brief under the heading "The California Cases." They were so-called because the appellate court cited them, with the exception of the *Peabody case*, which had not been decided when the instant opinion was written. Please see our discussion of the California cases at pages 211-239. We refer to them because respondents make reference to these cases as though they were in support of their contentions. A mere reading of the portion cited is sufficient to show that if the Oregon Water Code were to be construed as having cut off instantly all riparian rights which had not been applied prior to the enactment of the act, it was violative of the Federal Constitution, according to the doctrine of said California cases. Counsel overlook the fact that the State of California in November, 1928, adopted a constitutional amendment to help in the construction of the Water Commission Act of 1913 which tended, by regulation, to impair the vested riparian rights of riparian proprietors. Time and again that court had held that the regulatory statute was violative of the Constitution, hence, as stated in the instant opinion, the adoption of the amendment.

The Nevada and Arizona Cases.

At page 61, respondents cite *Reno Smelting, Milling & Reduction Works* v. *Stevenson*, 20 Nev. 269. We think the following citation from a later Nevada case will show that the Reno case is not in point here.

We make the following quotation from *Steptoe Livestock Co.* v. *Gulley* (Supreme Court of Nevada, Feb. 1931), 295 Pac. 774:

> "The right to appropriate the public waters of Nevada was recognized in this State in the early cases of *Lobdell* v. *Simpson et al.*, 2 Nev. 274, 90 Am. Dec. 537; *Ophir S. M. Co.* v. *Carpenter*, 4 Nev. 534, 97 Am. Dec. 550; *Covington* v. *Becker*, 5 Nev. 281; *Barnes* v. *Sabron*, 10 Nev. 217. And in *Walsh* v. *Wallace*, 26 Nev. 299, 67 P. 914, 99 Am. St. Rep. 692, this court recognized a vested right to water appropriated in territorial days. While it was held in *Vansickle* v. *Haines*, 7 Nev. 249, that the doctrine of riparian rights prevailed in this State, the rule thus enunciated was never fully accepted and was finally unequivocally overruled in the case of *Reno Smelting, Milling & Reduction Works* v. *Stevenson*, 20 Nev. 269, 21 P. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364."

In respondents' brief, pp. 57-8, it is alleged that until the privilege of using the water had been exercised, *respondents are of the opinion* that petitioner had nothing more than a *privilege* that was subject to withdrawal. This opinion is contrary to that expressed by Mr. Justice McBride in *Hanson* v. *Thornton, supra*, a quotation from which concludes petitioner's argument at pp. 307-8 of its brief.

And in support of that belief of respondents, it is then stated, that this was the ruling of the Supreme Court of Arizona in *Boquillas Cattle Co.* v. *Curtis*, 11 Ariz., 128.

This *seems* to be the case under consideration in 213 U. S. 339, and we quote from this court at page 346 because it quotes the Arizona court:

> "By the statutory Bill of Rights, Art. 22, all streams capable of being used for the purposes of irrigation are declared to be public property, and no one shall

have the right to appropriate them exclusively except under such equitable regulations as the legislature shall provide. And then chapter 55, Of Acequias or Irrigating Canals, after again declaring streams of running water public, § 1, enacts that "all the inhabitants of this territory who own or possess arable and irrigable lands shall have the right to construct public or private acequias, and obtain the necessary water for the same from any convenient river, creek, or stream of running water," § 3. By § 4, when such acequias run through the lands of private persons not benefited, the damages are to be assessed by the probate judge in a summary manner, on application of the party interested. § 4. Preference is given to irrigation over other uses. § 5. By § 7 the exclusive right to the water is given to the persons taking out a ditch for agricultural purposes, and a right to damages if the water afterwards is taken for mining. By § 17 precedence is given in time of scarcity to the oldest titles, and by § 25, "the regulations of acequias which have been worked according to the laws and customs of Sonora and the usages of the people of Arizona shall remain as they were made and used up to this day;" and the chapter is to be enforced from the day of publication. There are many more details, but we have recited enough to show that the interpretation given by the court below to the general adoption of the common law by the Howell Code, and the qualifications imposed upon it, were correct." (Citing.)

It will be noted that by the Bill of Rights, Article 22, all streams capable of being used for irrigation are subject to appropriation. Hence under no circumstances is the case in point.

Without further in this investigation we assume that the next case there cited from 229 Ariz. 305 is governed by the same constitutional and statutory provisions quoted from the opinion of this Court.

Actual and Threatened Damage.

At page 64 of respondent's brief is a discussion as to whether or not actual damage has been shown to result from the acts complained of in petitioner's complaint.

Except for the issuance of the injunction still in force, the injury would have been irreparable. The finding of the trial court that no damage *has yet resulted* from the acts complained of (XI, R-73), shows the necessity for the continuance of the injunction and the reversing of the cause. For it is admitted in the pleading, that it is the intention of respondents to immediately remove the rock, shattered by the dynamite, from the blasted area, and to draw down through the opening thus made, some 1400 second feet of water—more than twice the low flow of the stream. And while the injunction in the decree retains the elevation of the water at a height there required, this gives the petitioner *no protection* against resulting damage if the injunction be dissolved.

At page 261 of petitioner's brief is petitioner's "Exhibit 2 and 23." Thereon is shown by the letters "CC" indicated by a line designated by the word *"Reef"*, the location of reefs of rock, irregular in height, which act as a dam, and which would retain a little water so that the stream would trickle through the low places in the reef, leaving barren spots, and river bed between petitioner's line at the thread of the river, and the point to which the thread would have been moved by the sucking into the opening thus made, of practically all of the water in the stream at normal flow.

The result of affirmance of this case is to construe the Water Code as destroying petitioner's vested right to the use of its property for the manufacture of power, in which business it is engaged as a public utility, and to hand over to the cement company, which it now supplies with such

power, the water power naturally abiding with, and a part of petitioner's land. As was said by Mr. Justice Wilbur in the dissenting opinion herein, no case can be found to support such a result. The fact is that the statute is not subject to that construction, and this Court will hesitate to place upon an otherwise constitutional statute, a construction which will make it violate the Federal Constitution. The question was never decided by the Oregon court.

Petitioner requires this water power and would have a right even now under the Water Code to condemn it if the cement company possessed it, and to take it and pay for it, and to use it for public purposes.

Will this Court hold that the cement company, which has not been given the power of eminent domain, which owes no duty to the public with respect to supplying power to consumers, may, upon the bare authority of a State Engineer's permit, confiscate this property without compensation, and take it for private use, when it is held by the petitioner for a public use?

Respectfully submitted,

A. E. Reames,
Counsel for Petitioner.